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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED
TO ANY FORM OF DETENTION OR IMPRISONMENT

Written statement submitted by the World Confederation of Labour and the World Federation of Trade Unions, non-governmental organizations in consultative status (category I), by the American Association of Jurists, the International Association of Democratic Lawyers, the World Association of Former United Nations Interns and Fellows, the International Indian Treaty Council, the International Federation Terre des Hommes, the World Student Christian Federation, the Women's International League for Peace and Freedom, the International League for the Rights and the Liberation of Peoples, the International Movement for Fraternal Union Among Races and Peoples, Pax Christi International and Pax Romana, non-governmental organizations in consultative status (category II) and by the Movement Against Racism and for Friendship Among Peoples and the International Peace Bureau, non-governmental organizations on the Roster

The Secretary-General has received the following communication, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[15 January 1992]

DRAFT DECLARATION ON THE PROTECTION OF ALL PERSONS
FROM ENFORCED DISAPPEARANCE

1. The open-ended inter-sessional working group to consider the draft declaration on the protection of all persons from enforced or involuntary

disappearance met from 28 October to 8 November 1991. After two weeks of intensive work, the draft Declaration, which is to be submitted to the Commission on Human Rights at its forty-eighth session, was approved. The work of the group was based on the draft Declaration adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and on the written and oral observations made by many States and non-governmental organizations.

2. The draft Declaration is the outcome of several years of reflection and debate within a number of national and international bodies. The undersigned non-governmental organizations are of the view that the Declaration should be approved by the Commission on Human Rights at its forty-eighth session, as an invaluable contribution to the manifold efforts that are being made to prevent and punish the scourge of enforced disappearance of persons, which afflicts many countries, as is apparent from the reports of the Working Group on Enforced or Involuntary Disappearances of the Commission on Human Rights.

3. The undersigned non-governmental organizations are nevertheless deeply concerned by the decision of the open-ended working group, in the absence of a consensus, to remove universal jurisdiction from article 14 of the draft approved by the Sub-Commission.

4. Universal jurisdiction is not merely an aspiration of those working gradually to develop international law, but also an element of several binding international instruments, and may thus be described as a component of jus cogens. Universal jurisdiction is enshrined, inter alia, in the International Convention on the Suppression and Punishment of the Crime of Apartheid, (arts. IV and V), in the Convention on the Prevention and Punishment of the Crime of Genocide (arts. V and VI), in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (arts. 5 and 7) and, at the regional level, in the Inter-American Convention to Prevent and Punish Torture (art. 12).

5. More recently, in resolution 44/34, adopted on 4 December 1989, the United Nations General Assembly adopted without a vote the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, whose article 9 also establishes universal jurisdiction. On the same day, the General Assembly adopted, also without a vote, resolution 44/39, in which it requested the International Law Commission, bearing in mind the need to keep under review those topics ... which may be suitable for the progressive development of International Law, when considering the "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code.

6. With regard to the crime of enforced disappearance in particular, universal jurisdiction was enshrined in article 14 of the draft Declaration adopted by the Sub-Commission (E/CN.4/Sub.2/1990/32) and is also to be found in article 5 of the draft Inter-American Convention on Forced Disappearances of Persons, prepared by the Inter-American Commission on Human Rights for submission to the General Assembly of the Organization of American States.

7. In addition, the justiciable nature of human rights violations is an element of international law which is binding on all States. At its session held in Bogotá, Colombia, in June 1991, the Permanent People's Tribunal, composed of eminent persons and jurists from a number of countries, made the following declaration:

> "The relevant international instruments conceive human rights as being by their very nature justiciable. This is established by article 8 of the Universal Declaration of Human Rights, article 18 of the American Declaration, article 13 of the European Convention, article 2 of the International Covenant on Civil and Political Rights and article 25 of the American Convention. Pursuant to these articles, any violation of human rights must be referred to the courts. Consequently, if the violation involves a criminal offence, it entails the international, and not merely the domestic obligation to try and to punish the offence. The international human rights instruments establish a human right to justice if human rights are violated..." 1/

8. In particular, the draft Declaration has been broadly inspired by the Convention against Torture, which is quoted in the preambular part of the draft. In addition, article 1 states that enforced disappearance constitutes a violation of the "right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment". For its part, the Inter-American Court of Human Rights has declared that enforced disappearance implies cruel and inhuman treatment (Velázquez Rodriguez and Godínez Cruz decisions). Consequently, there is no doubt that the offence of torture is part of the offence of enforced disappearance. This means that in addition to the international obligation applying to all States by virtue of the nature, jus cogens, of universal jurisdiction and the concomitant international obligation arising from the justiciable nature of violations of human rights, the 76 States that have signed the Convention against Torture in particular are obliged to accept universal jurisdiction by virtue of articles 5 and 7 of the Convention. It should be noted that none of the signatory States have entered reservations in respect of those articles. In addition, the universal jurisdiction established in the Convention against Torture extends to enforced disappearances, which as we have seen, imply torture.

9. Accordingly, in addition to being a regrettable reversal of the prevailing trend of the norms adopted by the United Nations and at the regional level, removal of universal jurisdiction from the draft Declaration would be a transgression of the 1969 Vienna Convention on the Law of Treaties, and in particular of its articles 18 (obligation of States not to defeat the object and purpose of a treaty); 26 (pacta sunt servanda); 38 (rules in a treaty become binding through international custom) and 53 (priority of a peremptory norm of general international law - jus cogens).

1/ Proceso a la impunidad de crimenes de lesa humanidad en América Latina, 1989-1991. Permanent People's Tribunal, page 515. Edited by the International League for the Rights and the Liberation of Peoples - Colombian Section. Bogotá, Colombia, June 1991.

10. It has been claimed that universal jurisdiction constitutes interference in the domestic affairs of States. This is a strained but false argument: universal jurisdiction, as developed in the instruments that have been adopted and in regional and international draft instruments is a promising step forward towards universal protection of human rights and in no way affects the legitimate exercise of sovereignty by each of the member States of the international community.

11. For all these reasons, the undersigned non-governmental organizations request the Commission on Human Rights, at its forty-eighth session, to adopt the draft Declaration on the Protection of All Persons from Enforced Disappearance, as approved by the open-ended working group on 8 November 1991 (E/CN.4/1992/19), with the sole exception that the original wording of the second paragraph of article 14 should be restored, as approved by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-second session, and which was as follows: "This provision shall apply regardless of the individual's nationality or the place where the offence was committed."